

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 08-61134

IN RE: JIMMY LEE IVY

Movant

U.S. COURT OF APPEALS
FILED

MAR 03 2009

CHARLES R. FULBRUGE III
CLERK

Motion for an order authorizing
the United States District Court for the Southern
District of Mississippi to consider
a successive 28 U.S.C. § 2254 application


Before KING and STEWART, Circuit Judges.*

PER CURIAM:

Jimmy Lee Ivy, Mississippi prisoner # 80666, moves this court for authorization to file a successive 28 U.S.C. § 2254 application challenging his conviction and sentence for delivery of cocaine.

Ivy proposes to argue that (1) he is entitled to a new trial because of the discovery of new evidence that the offense was committed by Reshawn Meredith, rather than himself; (2) he was denied a fair trial because trial testimony indicated that impermissibly suggestive procedures were used in an undercover agent's identification of him as the perpetrator; (3) he was denied a fair trial because a jury instruction improperly amended the indictment; and (4) he should have been granted a mistrial based on prosecutorial misconduct because the prosecutor elicited testimony that was unsupported by any evidence and also improperly inquired about his criminal history at trial.

* This matter is being decided by a quorum. 28 U.S.C. § 46(d).

CD/K


Ivy has not shown that (1) his claims rely on a new rule of constitutional law that was made retroactive to cases on collateral review by the Supreme Court and was previously unavailable; or (2) the factual predicate for his claims could not have been discovered previously through due diligence and the underlying facts, if proven, would establish by clear and convincing evidence that, but for constitutional error, no reasonable trier of fact would have found him guilty of the underlying offense. See 28 U.S.C. § 2244(b)(2), (b)(3)(C).

Accordingly, IT IS ORDERED that Ivy's motion for authorization to file a successive § 2254 application is DENIED.